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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CURTIS GASSOWAY, Defendant and Appellant.	B219544 (Los Angeles County Super. Ct. No. BA 346636)

APPEAL from a judgment of the Superior Court of Los Angeles County, Drew E. Edwards, Judge. Affirmed.

Ronald White for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

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Curtis Gassoway was found guilty by a jury of two counts of assault with a deadly weapon (a car) and possession of a counterfeit seal (a California identity card). Appellant appeals from the judgment of conviction, contending: (1) there was insufficient evidence to support the judgment, (2) the court improperly admitted improper expert opinion, (3) there was no proof of his intent to defraud, (4) a prosecution witness's outburst unfairly prejudiced the jury, and (5) the cumulative effect of such error merits reversal. We affirm.

FACTS

1. Prosecution Evidence

Late in the evening of August 31, 2008, appellant's former girlfriend, Justi Embree, was parked near the intersection of 70th Street and Hoover Avenue in Los Angeles in her black BMW. Appellant pulled up alongside Embree's car in his white Lexus. He appeared upset as he got out of his car and approached Embree's car. Appellant asked Embree to roll down her car window. Instead, Embree locked her car doors. Appellant told Embree he would really hate to have to break her window. Embree became frightened and wanted to leave. Appellant eventually returned to his car and then Embree was able to drive away.

Appellant in his Lexus pursued Embree's BMW as she sped westbound on Florence Avenue. Both cars at times were going at a high rate of speed, about 50 miles per hour. Embree ran a red light at the intersection of Florence and Vermont Avenues and made a sudden turn south onto Vermont from the left lane. Appellant in his Lexus turned south also, but from the right lane. He sideswiped the BMW on the passenger side with his Lexus. As Embree continued down Vermont Avenue, appellant slammed into her car again, pushing her car about three feet over towards the center median.

When it appeared appellant was going to try to sideswipe her car again, Embree abruptly slowed down. Appellant's Lexus shot ahead and missed Embree's BMW but crossed into the northbound lane of Vermont and crashed into a pole before striking Edgar Carranza's truck, which was waiting to make a left turn. Embree continued south because she was in fear.

Before appellant crashed into his truck, Carranza saw a white car (the Lexus) and a black car (the BMW) driving fast and heading southbound toward the intersection where Carranza was stopped in his truck. Carranza saw the white car move left toward the black car and collide with it. The black car moved to the left after it was hit. Thirty seconds later, Carranza saw the white car move to the left another time and crash into the black car again. As the white car started to move to the left yet again, the black car suddenly slowed down, and the white car shot across the lane, hit a pole and struck the driver's side of Carranza's truck.

Appellant reversed a few feet after striking Carranza's truck and then tried to flee on foot. An officer in a patrol car stopped appellant and arrested him.

Carranza testified his truck, a Ford F150, sustained substantial damage including a crumpled hood and bent frame. The force of the collision pushed his truck back 12 feet and off to the side. Both the Lexus and the BMW sustained substantial damage.

Los Angeles Police Department Officer Juan Manzo searched appellant's car after he was taken into custody. Officer Manzo found a California identity card in the center console of the Lexus. The identity card had appellant's photo, the name "Jeremiah Pax Mitchell," Mitchell's address, and a number associated with the driver's license for "Freddy J. Lanuza." The identity card also contained holographic California DMV (Department of Motor Vehicle) and state seals laminated in the card. There were no markings on the identity card to alert anyone it was invalid or to be used for training purposes only.

2. Defense Evidence

Salome Arzu, appellant's partner, testified she had operated a tax preparation business with appellant for two years. The business operated as a franchise under the name, "Liberty Tax Service." They sometimes had clients who were in drug treatment and lockdown facilities, and their employees needed to be able to verify client identity through driver's licenses and social security numbers. The employees of the tax business received training from the IRS (Internal Revenue Service) fraud department on spotting

fake identification. Appellant assisted in this training. Arzu stated appellant had used the "Jeremiah Pax Mitchell" identification to train employees.

Arzu asserted that appellant obtained the fake identity card on "Alvarado Street," but it was used only for the training that occurred at the office. Arzu did not know "Freddy J. Lanuza" or "Jeremiah Pax Mitchell" and did not have permission to use their information. The fake identity card was only supposed to be used for training in the office, and appellant had no responsibility to keep the fake identity card with him at all times.

PROCEDURAL HISTORY

An amended information charged appellant in three felony counts with assault with a deadly weapon upon Embree and upon Carranza and possession of a counterfeit seal. In a bifurcated trial, the jury found him guilty of all three crimes. Appellant filed a motion for new trial, which the court denied.[1]

Appellant waived a jury trial on the issue and admitted as true the allegation that he had suffered a prior serious or violent felony conviction. The court denied appellant probation and sentenced him to a term of 12 years four months in state prison.

Appellant timely appealed.

DISCUSSION

1. Insufficiency of Evidence

In criminal cases, when there is a claim of insufficiency of the evidence: "[W]e review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]"

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[1] The trial judge declared, "[i]n my view, . . . the jury got it right. [I]t wasn't even that close of a call to me. I do believe that the jury was correct that all the elements were more than proven up as to all three counts . . . . [¶] I am not going to substitute my judgment for the jury's judgment in this case."

(*People v. Bolin* (1998) 18 Cal.4th 297, 331.) Viewing the entire record, we conclude sufficient substantial evidence supports appellant's conviction of the crimes charged in this case.

A. Assault with Deadly Weapon

Penal Code section 245, subdivision (a)(1) punishes assaults committed "with a deadly weapon or instrument other than a firearm," or by "any means of force likely to produce great bodily injury."[2] (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) Whether the victim in fact suffered any harm is immaterial, because the statute focuses on the use of a deadly weapon or instrument or, alternatively, on force that is likely to produce great bodily injury. (*Ibid.*) A deadly weapon within the meaning of section 245, subdivision (a)(1) is "'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.'" (*Aguilar*, at pp. 1028-1029.) A defendant is guilty of an assault when he willfully commits an act the direct and probable result of which is a battery. (*People v. Williams* (2001) 26 Cal.4th 779, 785-786.)

In the present case, there was more than sufficient evidence to support the verdicts. Appellant approached Embree while she was parked in her car and demanded that she roll down her window. Appellant was angry and, when Embree failed to comply with his request, he told her he would hate to have to break her window. Embree finally was able to drive away, but appellant pursued her at high speeds in his car. Appellant then purposefully and deliberately crashed his car into the side of Embree's car multiple times. Police Sergeant Terence Keenan and Carranza both testified they observed appellant's car move toward Embree's car crashing into the passenger side of her car more than once. There was thus ample evidence from witnesses, including Embree, that appellant used his car as a weapon to assault Embree and any hapless bystander in the near vicinity. Appellant's assault of Embree did not end until Embree suddenly braked her car when appellant was attempting to smash into her car once again, and appellant's

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[2] All further statutory references are to the Penal Code.

car overshot Embree's, crashed into a pole and smashed into Carranza's truck instead. A reasonable jury could conclude from the evidence that appellant's conduct was not merely "negligent," "wanting," "accidental," or "reckless" but rather was purposeful, willful and intentional.

These circumstances provide substantial evidence that appellant committed an assault with a deadly weapon upon Embree and upon Carranza.

B. Possession of Counterfeit Seal

The record also shows sufficient evidence from which the jury could reasonably find appellant guilty of possession of a counterfeit seal with intent to defraud.

Section 472 provides in relevant part: "Every person who, with intent to defraud another, forges, or counterfeits the seal of this State, the seal of any public officer authorized by law, . . . or any other public seal authorized or recognized by the laws of this State, . . . Government, or country, or who falsely makes, forges, or counterfeits any impression purporting to be an impression of any such seal, or who has in his possession any such counterfeited seal or impression thereof, knowing it to be counterfeited, and willfully conceals the same, is guilty of forgery."

When intent to defraud is an element of an offense, "it is sufficient if an intent appears to defraud any person, association, or body politic or corporate, whatever." (§ 8.) Intent can seldom be proved by direct evidence; thus, the act itself plus its surrounding circumstances generally form the basis from which intent legitimately may be inferred. (*People v. Smith* (2009) 178 Cal.App.4th 475, 479 ["Because intent can seldom be proven by direct evidence, it typically is inferred from the circumstances"]; *People v. Smith* (1998) 64 Cal.App.4th 1458, 1469 [intent inferred from attempt to purchase item with counterfeit credit card bearing defendant's name but with account information from valid card].)

Appellant contends the prosecution proved only that he possessed the seal on the California identity card and there was insufficient evidence that he possessed the seal with the intent to defraud.

The nature of the forged document and the circumstances of appellant's possession provided sufficient evidence from which the jury rationally could conclude that he possessed the counterfeit seal with intent to defraud. The forged identity card was found in the center console of appellant's car. The name on the falsified identification did not match the name of the legitimate holder of the license (Freddy J. Lanuza). The false identity card had the name "Jeremiah Pax Mitchell," but it contained appellant's photograph and bore the seal of the State of California. Appellant's business partner testified that appellant obtained the identity card from "Alvarado Street" and that he assisted in the office's training of employees in recognizing false identifications and licenses. She further testified the false identity card was used for training purposes -- and no other -- and that such training occurred only in the office and appellant was not required to keep the card with him. She also testified she did not know Jeremiah Pax Mitchell or Freddy Lanuza and had not received permission to use their information.

"'Specific intent as an element of a crime may be proved by circumstantial evidence.'" (*People v. Castellanos* (2003) 110 Cal.App.4th 1489, 1493 [possession of forged resident alien card bearing defendant's photograph]; see also *People v. Wilkins* (1972) 27 Cal.App.3d 763, 773 [possession of counterfeit blank motor vehicle registration cards, blank sheets of selective service cards and instructions on how to make California driver's licenses]; *People v. Norwood* (1972) 26 Cal.App.3d 148, 159 [unauthorized possession of instruments for payment of money and driver's license in another's name].) In *Castellanos*, the court held that the defendant's possession of a forged resident alien card bearing his photograph could "create a legal right or obligation to someone such as a prospective employer." (*Castellanos*, *supra*, at p. 1494.)

Quoting *Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 388, the *Castellanos* court noted: "'Making virtually any kind of false document affords an inference that the maker intends to deceive someone. However, only a document with apparent legal efficacy is naturally suited to perpetrate the kind of deception that is strictly speaking a defrauding. Fabricating such a document by that very act affords an inference of an intention to "defraud," namely by such deceit to detrimentally accomplish something akin

to a theft by false pretenses.'" (*Castellanos, supra*, 110 Cal.App.4th at p. 1494.) A driver's license photograph is the "most reliable, accurate, and timely means of identifying persons while on the public roadways." (*Valov v. Department of Motor Vehicles* (2005) 132 Cal.App.4th 1113, 1128.) Similarly, a California identity card bearing one's photograph can also serve as a convenient method to readily establish one's identity in routine commercial transactions, and it is put to such use in myriad transactions of everyday life. Appellant's possession of a false identity card bearing his photo, a false name and the license number issued to another person, together with California state seals, provided ample evidence of his intent to defraud.

2. Purported Expert Opinion

Appellant contends that Police Sergeant Kennan's testimony that he had witnessed an "assault with a deadly weapon" when he saw appellant's car sideswipe Embree's car was improper expert opinion and invaded the jury's province. We disagree and, in any case, hold any error harmless.

Initially, we note that appellant failed to preserve for appeal any claim that the admission of Sergeant Keenan's testimony was improper by failing to raise an objection to the sergeant's testimony in the court below. (*People v. Boyette* (2002) 29 Cal.4th 381, 423-424 (*Boyette*).) The requirement that an objection to evidence be timely made is imperative because it "'allows the court to remedy the situation before any prejudice accrues.'" (*Id.* at p. 424, quoting *People v. Taylor* (1982) 31 Cal.3d 488, 496.) A judgment will not be reversed on the ground that evidence was erroneously admitted unless a clear and specific objection was raised, or a motion to exclude or strike such evidence was made, in the trial court. (*People v. Mattson* (1990) 50 Cal.3d 826, 853-854; Evid. Code, § 353, subd. (a); see also *People v. Marks* (2003) 31 Cal.4th 197, 228.) Appellant failed to make any timely objection to Sergeant Keenan's evidence in the trial court. The court thus had no opportunity to consider whether such an objection had merit and no opportunity to prevent any claimed error.

In any case, a reviewing court will not reverse a judgment based on the erroneous admission of evidence unless the error or errors complained of resulted in a miscarriage

of justice. (Evid. Code, § 353, subd. (b); *People v. Harris* (2005) 37 Cal.4th 310, 336.) Because other evidence clearly established appellant's guilt, it is not reasonably probable that any error in admission of such testimony affected the outcome for appellant. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

3. Witness's Spontaneous Outburst

Prior to trial, the court denied the prosecution's motion to admit testimony from Embree that there had been a prior act of domestic violence against her by appellant. The court ruled the prosecution had failed to comply with notice requirements under Evidence Code section 1109, and it excluded the evidence under Evidence Code section 352 as substantially more prejudicial than probative.

During direct examination, Officer Manzo testified he interviewed Embree after the incident. Embree had related that appellant told her to roll down her car windows but she did not do so because she was in fear. The prosecutor then inquired if Embree had said "what she was afraid of." Manzo responded that Embree "had stated that there had been prior domestic violence," at which point the prosecutor interrupted him, saying, "I'm going to stop you there." Appellant's counsel interposed an objection and asked for an instruction. The court called a recess and held a sidebar conference with both counsel.

Out of the presence of the jury, the court stated it had previously excluded any evidence regarding prior domestic violence between appellant and Embree. The court asked appellant's counsel whether, in light of that ruling, he wished to have any sort of limiting instruction. Defense counsel responded by moving for a mistrial. He asked "secondarily" for some limiting instruction, noting the prosecution had also referred to domestic violence in voir dire and had implied that the defense was "attempting to hide something" through its objections to domestic violence questions.

The prosecutor stated he had instructed the officer not to mention any statements regarding domestic violence and in any case did not believe there was any prejudice from the officer's testimony. If defense counsel insisted on a limiting instruction, the prosecutor noted, "I don't even know [of what] nature it would be." The prosecutor suggested the court strike the answer and, if it decided a limiting instruction was

warranted, that it instruct the jury to disregard any answers regarding other arrests. The court acknowledged there was an issue as to what the jury actually heard; it took the matter under submission so that it could have the reporter read back her notes.

Before the jury returned to the courtroom, the court stated for the record that it had excluded all Evidence Code section 1109 evidence of a prior domestic violence incident between appellant and Embree. The court observed there was at least a "specter" of some prejudice, and "perhaps" substantial prejudice, from Officer Manzo's mention of a prior domestic violence incident between appellant and Embree, and it alluded to California Supreme Court authority to the effect that a witness's volunteered statement can provide a basis for a finding of incurable prejudice. The court stated it would adjourn proceedings for the day, and it invited both counsel to provide relevant authorities and argument on the issue to the court the following morning.

At that juncture, defense counsel withdrew the motion for mistrial and requested a limiting instruction to the effect that the case was "not about domestic violence" and the jury should not consider any reference to such matter. The court did not agree with counsel's statement noting domestic violence was "certainly in the background." The court informed counsel it would craft a limiting instruction overnight to give the jury the next day. Defense counsel having withdrawn the motion for mistrial, the court allowed the trial to proceed.

Later that day, after the jury was excused for the evening, the court further discussed a limiting instruction with counsel and indicated a willingness to give such an instruction. The court observed, however, that the instruction might only highlight testimony that the jury may or may not have heard.[3] Appellant's counsel thereupon withdrew the request for a limiting instruction.

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[3] The court offered to instruct the jury that although Officer Manzo gave some testimony regarding a prior domestic violence incident between appellant and Embree, that matter was not in evidence and the jury should not consider the testimony in any fashion.

A. Prosecutorial Misconduct

Appellant asserts the prosecutor succeeded in ringing "a loud 'bell'" before the jurors by knowingly introducing evidence of domestic violence from a previous occasion to supply a "motive" for the offense.

A prosecutor's conduct violates the federal Constitution when it encompasses a pattern of conduct so egregious that it infects the trial with such unfairness so as to deny a defendant due process. (*People v. Navarette* (2003) 30 Cal.4th 458, 506.) A prosecutor's behavior that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves use of deceptive or reprehensible methods to attempt to persuade the court or the jury. (*Ibid.*) However, a witness's volunteered statement can provide the basis for a finding of incurable prejudice to the defendant. (*People v. Wharton* (1991) 53 Cal.3d 522, 565.)

A motion for mistrial should be granted when the court is apprised of prejudice that it deems to be incurable by admonition or instruction. (*People v. Lucero* (2000) 23 Cal.4th 692, 713-714; see also *People v. Davis* (2005) 36 Cal.4th 510, 554.) Whether a particular incident is incurably prejudicial is a speculative matter, and the trial court is vested with considerable discretion in ruling upon a motion for mistrial. (*People v. Avila* (2006) 38 Cal.4th 491, 573.) We thus review the trial court's ruling on a motion for mistrial for abuse of discretion. (*Ibid.*)

In the present case, there was no evidence the prosecutor committed prosecutorial misconduct by deliberately eliciting inadmissible evidence. The prosecutor was examining Officer Manzo regarding what Embree had reported when he interviewed her following the incident. Officer Manzo testified Embree related she had gone to her car to obtain a more convenient parking space when appellant drove up in his car; appellant got out, appeared to be angry and told Embree to roll down her window; and Embree said she kept the doors locked and the windows rolled up "because she was in fear." The prosecutor then asked Officer Manzo if Embree said "what she was afraid of," and the officer replied, in violation of the court's in limine order, that Embree stated "there had been prior domestic violence."

There was no showing the prosecutor intended to elicit inadmissible evidence by his question. Indeed, when Officer Manzo's questioning resumed after defense counsel's withdrawal of the motion for mistrial, the officer refreshed his recollection with his police report and testified Embree was in fear because appellant told her he would "really hate to break [her] window." The prosecutor informed the court he had instructed the officer *not* to mention domestic violence, and we presume the prosecutor as an officer of the court was truthful in making this representation. Further, the prosecutor immediately stopped the witness, as soon as he referred to the excluded matter. There was no prolonged questioning to elicit excluded evidence, and, as the trial court noted, the nature of the charged crime itself involved some measure of domestic violence. Accordingly, the trial court found the mere mention of the subject was not incurably prejudicial. Indeed, at the end of trial the court allowed both counsel to argue domestic violence, or not, to the jury. The court below determined although Officer Manzo's testimony raised a "specter" of prejudice, such prejudice was not incurable and not sufficiently prejudicial to justify a mistrial. We find no abuse of discretion in the court's ruling.

B. Ineffective Assistance of Counsel

Appellant claims he was denied the effective assistance of counsel under the Sixth Amendment when counsel withdrew the mistrial motion. Appellant asserts the court clearly was considering granting the motion. We disagree.

To show ineffective assistance of counsel, the appellant must establish counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and he suffered prejudice from counsel's poor performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) Appellant has failed to show counsel's representation fell below the objective standard of reasonableness or that he was prejudiced. It appears from the record that counsel withdrew the mistrial motion for tactical reasons, and in any

case appellant was not prejudiced because it is clear the trial court did not consider the mere mention of domestic violence to be fatal.[4]

DISPOSITION

The judgment is affirmed.

FLIER, J.

We concur:

BIGELOW, P. J.

GRIMES, J.

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[4] Because we find no substantive error, we need not address appellant's further argument that cumulative errors mandate a reversal of the judgment.